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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

MICHAEL STARR,	)	
	)	
Plaintiff,	)	2:06-cv-00616-RLH-RJJ
	)	
vs.	)	
	)	
MGM MIRAGE, a Delaware Corporation; et al.,	)	
	)	
Defendants.	)	<b><u>ORDER</u></b>
_____	)	

This matter was referred to the undersigned Magistrate Judge on Plaintiff, Michael Starr's Application to Conduct Discovery (#31). The Court has considered the Application (#31), The defendants' Response (#37), and Plaintiff's Reply (#38).

**BACKGROUND**

On June 18, 1998, Circus Circus Enterprises established a Supplemental Executive Retirement Plan (SERP) for its executive employees. The SERP was initially named the Circus Circus Enterprises, Inc. Supplemental Executive Retirement Plan and subsequently the name was changed to the Mandalay Resort Group Supplemental Executive Retirement Plan. On January 19, 1999, Starr was notified that as a key employee he was eligible to participate in the SERP. Starr executed the required documents and became a plan participant on January 29, 1999. When Mandalay Resort Group and MGM Mirage (MGM) merged, Starr was notified on November 29, 2004, prior to the merger, of the optional forms of benefits available under the SERP and

1 informed that he would receive the benefits he was entitled to under the plan consistent with his  
2 elected optional form of benefits. Starr elected to receive his benefits in the form of an annuity  
3 for 20 years during his lifetime commencing at the age of 55.

4 Subsequently, MGM decided to terminate the SERP and to pay Starr his benefits in a  
5 lump sum payment. Starr seeks limited discovery on MGM's decision to make a lump sum  
6 payment in lieu of the benefits in the form he selected, and MGM's calculation of the lump sum  
7 payment. The lump sum payment was calculated as of July 1, 2005, the date the SERP was  
8 terminated. On July 1, 2005, MGM made a lump-sum payment to Starr in the amount of  
9 \$1,464,663.00. On September 6, 2005, Starr returned the check, number 0055188, to MGM with  
10 a letter demanding that MGM comply with its contractual obligations under the terms of the  
11 SERP. MGM denied Starr's request for an annuity on July 21, 2006.

12 This case was initially filed in the Eight Judicial District Court, Clark County, Nevada,  
13 and was removed to this Court on May 17, 2006. MGM filed a Motion to Dismiss which was  
14 granted as to all claims with the exception of the 29 U.S.C. § 1132(a)(1)(B) claim. Subsequently,  
15 MGM filed a Motion for Summary Judgment attaching two documents (1) Details to Statement  
16 of Termination Benefit Letter Dated June 15, 2005, and (2) Mandalay Resort Group Unanimous  
17 Written Consent in Lieu of a Meeting of the Board of Directors. Starr asserts that these  
18 documents were never previously provided to him. The documents detail the actual calculation  
19 of the lump sum payment and state that each participant's accrued benefits were to be paid in the  
20 form of a lump sum payment based on a discount rate of 6% and mortality assumptions using  
21 110% of the RP 2000 Mortality Table (healthy males). After MGM refused Starr's informal  
22 request for discovery, Starr filed the instant application. (#31).

23 Starr is requesting that this Court authorize discovery in order to obtain information on  
24 four issues: (1) the calculation of the lump sum payment based upon the mortality tables  
25 including: (a) disclosure of the actual mortality rate from RP 2000 Mortality Table used to  
26 compute the present value factor of 12.6725254428493, (b) the life expectancy used for Starr, ©  
27 the mathematical formula used to convert the mortality rate used into Starr's life expectancy, and  
28 (d) the mathematical formula used to arrive at the present value factor of 12.6725254428493

1 given Starr's life expectancy and an interest rate of six percent; (2) the circumstances  
2 surrounding MGM's decision to adopt a discount rate of six percent in calculating the amount of  
3 the lump payment; (3) the circumstances surrounding and reasoning behind MGM's decision to  
4 pay a lump sum payment rather than purchasing an annuity for the benefit of Starr; and (4)  
5 whether MGM considered the purchase of an annuity for Starr in order to provide him with the  
6 same benefits he elected, and whether MGM determined that the cost of such annuity would be  
7 greater than the amount of the lump sum payment MGM made to Starr. MGM contends that  
8 discovery should not be permitted because the abuse of discretion standard applies in this case,  
9 thereby limiting the Court to review only the administrative record.

#### 10 11 DISCUSSION

12 "The beneficiary of an ERISA plan may bring a civil action against a plan administrator  
13 'to recover benefits due to him under the terms of his plan, to enforce his rights under the terms  
14 of the plan, or to clarify his rights to future benefits under the terms of the plan.'" Taft v.  
15 Equitable Life Assurance Society, 9 F.3d 1469, 1471 (9<sup>th</sup> Cir. 1993). If the plan vests the  
16 administrator of the plan with discretionary authority to determine eligibility for benefits, a  
17 district court reviews the administrator's determinations only for an abuse of discretion. 9 F.3d  
18 at 1471 (citations omitted). The plan at issue states that "[t]he Administrative Committee may  
19 adopt such rules and regulations not inconsistent with the provisions of the Plan as it deems  
20 necessary or appropriate for the proper administration of the Plan and shall have the authority, in  
21 its sole and absolute discretion, to interpret and construe any provision of the Plan." Mandalay  
22 Resort Group Supplemental Executive Retirement Plan § 8.2 Procedures. Under this plan, the  
23 administrator is vested with discretionary authority to interpret the plan and determine eligibility  
24 for benefits and the amount of benefits. Therefore, the standard of review is an abuse of  
25 discretion. "[T]he abuse of discretion standard permits the district court to 'review only the  
26 evidence presented to the [plan] trustees.'" 9 F.3d at 1471, citing Jones v. Laborers Health &  
27 Welfare Trust Fund, 906 F.2d 480, 482 (9<sup>th</sup> Cir. 1990).

28 A primary goal of ERISA was to provide a method for workers and beneficiaries to

1 resolve disputes over benefits inexpensively and expeditiously. Permitting or  
2 requiring district courts to consider evidence from both parties that was not presented  
to the plan administrator would seriously impair the achievement of that goal.

3 9 F.3d at 1472.

4 “If, however, the plan administrator is also the insurer ‘that conflict [of interest] must be  
5 weighed as a ‘factor in determining whether there is an abuse of discretion.’” Tremain v. Bell,  
6 196 F.3d 970, 976 (9<sup>th</sup> Cir. 1999), citing Snow v. Standard Ins. Co., 87 F.3d 327, 330 (9<sup>th</sup> Cir.  
7 1996) (quoting Firestone Tire & Rubber Co. Et al. V. Bruch et al., 489 U.S. 101, 115 (1989)).  
8 This is due to the fact that “such an administrator has an incentive to pay as little in benefits as  
9 possible to plan participants because the less money the insurer pays out, the more money it  
10 retains in its own coffers.” Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 966 (9<sup>th</sup> Cir.  
11 2006). Here, the SERP was administered by an Administrative Committee. The Administrative  
12 Committee was the Board of Directors of Mandalay Resort Group. The Board of Directors  
13 revoked the prior Administrative Committee appointments and appointed itself as the  
14 Administrative Committee. See Mandalay Resort Group Unanimous Written Consent in Lieu of  
15 a Meeting of the Board of Directors, and Exhibit A, May 31, 2005. In this case, the insurer is  
16 also the plan administrator. Therefore, “[t]he district court may, in its discretion, consider  
17 evidence outside the administrative record to decide the nature, extent, and effect on the  
18 decision-making process of any conflict of interest; the decision on the merits, though, must rest  
19 on the administrative record once the conflict (if any) has been established, by extrinsic evidence  
20 or otherwise.” Abatie, 458 F.3d at 970, citing Doe v. Travelers Ins. Co., 167 F.3d 53, 57 (1<sup>st</sup> Cir.  
21 1999).

22 In this case, Starr is requesting discovery in order to show material, probative evidence  
23 that the fiduciary’s self-interest caused the alleged breach of the administrator’s fiduciary  
24 obligations to the beneficiary. Starr believes that the requested discovery may show that MGM  
25 benefitted from the payment of the lump sum. This would impact the Court’s analysis of  
26 whether the administrator abused his discretion because “the existence of a conflict of interest is  
27 relevant to how a court conducts abuse of discretion review.” Abatie, 458 F.3d at 965, citing  
28 Firestone, 489 U.S. at 115.

1 In this case, it is important to allow discovery into the decision making process of the  
2 plan administrator.

3 A district court, when faced with all the facts and circumstances, must decide in each  
4 case how much or how little to credit the plan administrator's reason for denying  
5 insurance coverage. An egregious conflict may weigh more heavily (that is, may  
6 cause the court to find an abuse of discretion more readily) than a minor, technical  
7 conflict might. . . . The level of skepticism with which a court views a conflicted  
8 administrator's decision may be low if a structural conflict of interest is  
9 unaccompanied, for example, by any evidence of malice, of self-dealing, or of a  
parsimonious claims-granting history. A court may weigh a conflict more heavily if,  
for example, the administrator provides inconsistent reasons for denial, fails  
adequately to investigate a claim or ask the plaintiff for necessary evidence, fails to  
credit a claimant's reliable evidence, or has repeatedly denied benefits to deserving  
participants by interpreting plan terms incorrectly or by making decisions against the  
weight of evidence in the record.

10 Abatie, 458 F.3d at 968-69 (internal citations omitted).

11 The allegations that the Plan Administrator breached the fiduciary duties owed to Starr  
12 based on the fact that the Plan Administrator owed fiduciary duties to both Starr and the Rabbi  
13 trust is sufficient to allow the plaintiff to conduct discovery on issues of a conflict of interest.  
14 Amended Complaint (#8), at ¶ 33; See Medford v. Metro. Life Ins. Co., 244 F. Supp. 2d 1120,  
15 1127 (D. Nev. 2003). Starr should be allowed limited discovery on whether there was a conflict  
16 of interest affecting his benefits determination, and to what extent. The requested discovery is  
17 relevant as to whether or not the plan administrator had a self-interest or was self-dealing.

18 The Ninth Circuit has stated that a "pattern of inconsistency and insufficiency in the plan  
19 administrator's reasons for terminating the appellant's benefits[.]" is "material evidence of its  
20 self-interested behavior . . . ." Regula v. Delta Family-Care Disability Survivorship Plan, 266  
21 F.3d 1130, 1147 (9<sup>th</sup> Cir. 2001), citing Lang v. Long-Term Disability Plan of Sponsor Applied  
22 Remote Tech., 125 F.3d 794, 799 (9<sup>th</sup> Cir. 1997). Therefore, the circumstances surrounding the  
23 decision to pay the lump sum are relevant. Starr alleged in his complaint that the June 9, 2005,  
24 notice of the lump sum payment was devoid of any reason or explanation as to the basis for the  
25 termination of the SERP. Amended Complaint (#8), at ¶ 25. This Court has stated that "[a]n  
26 administrator's failure to provide reasons for its denial of benefits" is evidence of a conflict.  
27 Medford, 244 F. Supp. 2d at 1129, citing Halpin v. W.W. Grainger, Inc., 962 F.2d 685, 689 (7<sup>th</sup>  
28 Cir. 1992). Starr also alleged that MGM initially notified him of the decision to continue the

1 SERP in light of the merger. Amended Complaint (#8), at ¶ 20. “An administrator’s change in  
2 position without receipt of any new evidence” is likewise evidence of the fiduciary’s self-interest.  
3 Medford v. Metro. Life Ins. Co., 244 F. Supp. 2d 1120, 1129 (D. Nev. 2003), citing Regula, 266  
4 F.3d at 1146 (citing, Brown v. Blue Cross & Blue Shield of Alabama, Inc., 898 F.2d 1556, 1569  
5 (11<sup>th</sup> Cir. 1990)). The Ninth Circuit has also determined that “[a]n administrator’s failure to  
6 provide sufficient notice of the denial of the claim” can also be evidence of a conflict of interest.  
7 Medford, 244 F. Supp. 2d at 1129, citing Friedrich v. Intel Corp., 181 F.3d 1105, 1110 (9<sup>th</sup> Cir.  
8 1999). Starr also contends that the short notice given regarding the lump-sum payment is  
9 evidence of malice. Amended Complaint (#8), at ¶ 32.

10 Although the plan administrator did not deny benefits entirely in this case, Starr is  
11 alleging that his benefits were reduced. In determining whether the plan administrator abused its  
12 discretion in determining to pay the lump sum payment and the amount of the payment, it is  
13 necessary for the Court to be fully informed about the facts and circumstances surrounding that  
14 decision including the extent of any conflict of interest that may have arisen. The calculation of  
15 the lump sum payment, including the decision to adjust the payment by a six percent discount  
16 rate, may show that the plan administrator was operating under a conflict of interest when  
17 determining the type and amount of payment. The circumstances surrounding the decision to pay  
18 the lump sum rather than purchasing an annuity for Starr, and whether or not the plan  
19 administrator considered purchasing an annuity, may lead to evidence showing that the plan  
20 administrator was self-dealing by paying the lump sum to save itself money. This is relevant  
21 since “the court may consider evidence beyond that contained in the administrative record that  
22 was before the plan administrator, to determine whether a conflict of interest exists that would  
23 affect the appropriate level of judicial scrutiny.” Abatie, 458 F.3d at 970, citing Tremain, 196  
24 F.3d at 976-77. Therefore, Starr may conduct the requested discovery to determine whether or  
25 not there is a conflict of interest, and if so, the extent of that conflict.


## 26 27 ORDER

28 Based on the foregoing, and good cause appearing therefore,

1 IT IS HEREBY ORDERED that the plaintiff's Application to Conduct Discovery (#31) is  
2 **GRANTED.**

3 IT IS FURTHER ORDERED that the limited discovery authorized by this Order shall be  
4 conducted on or before July 23, 2007.

5 DATED this 23<sup>rd</sup> day of May, 2007.

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ROBERT J. JOHNSTON  
United States Magistrate Judge